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In the Supreme Court of the United States

OCTOBER TERM, 1996

MARION S. BARRY, JR., *et al.*,
Petitioners,

v.

LASHAWN A., BY HER NEXT FRIEND, EVELYN MOORE, *et al.*,
Respondents.

Reply to Brief in Opposition to Petition for a Writ of Certiorari to the United States Court of Appeals for the District of Columbia Circuit

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13 pp

TABLE OF CONTENTS

INTRODUCTION 1

ARGUMENT 2

I. The Exercise Of Pendent Jurisdiction Here Conflicts With The Decisions Of This Court And Other Circuits. 2

II. The District Of Columbia Did Not Waive Its Objection To The Exercise Of Pendent Jurisdiction. 4

III. The District Did Not Consent To Any Remedial Order Purportedly Based On Local Law. 7

IV. The District Has Not Violated Rights. . . 9

CONCLUSION 10

TABLE OF AUTHORITIES

CASES

Arizonans for Official English v. Arizona, 117 S. Ct. 1055 (1997) 1, 6

Blessing v. Freestone, 65 U.S.L.W. 4265 (U.S. April 22, 1997) 1

District of Columbia Court of Appeals v. Feldman, 460 U.S. 462 (1983) 3

Doe by Fein v. District of Columbia, 93 F.3d 861 (D.C. Cir. 1996) 9

Pennhurst State School & Hospital v. Halderman, 465 U.S. 89 (1984) 2

People Who Care v. Rockford Board of Education, 961 F.2d 1335 (7th Cir. 1992) 7

Port Authority Trans-Hudson Corp. v. Feeney, 495 U.S. 299 (1990) 5

Suter v. Artist M., 503 U.S. 347 (1992) 9

United Mine Workers of America v. Gibbs, 383 U.S. 715 (1966) 3, 4

United States v. Armour & Co., 402 U.S. 673 (1971) . . 8

United States v. ITT Continental Baking Co., 420 U.S. 223 (1975) 8

STATUTES

42 U.S.C. § 1983 9

District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473 (1970) 3

D.C. Code § 11-1101(9) & (13) (1995 repl.) . . . 6

District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973) 3

D.C. Code § 6-2122(c) (1995 repl.) 10

D.C. Code § 16-2323(b) (1989 repl.) 10

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REPLY TO BRIEF IN OPPOSITION

INTRODUCTION

The opposition is replete with errors, so many in number that this reply can address only a few of them. These errors should not be permitted to obscure the two central issues in this case or the character of this litigation.

First, the D.C. Circuit has ruled that a federal court may "reform" local government institutions, and displace and otherwise interfere with the legitimate activities of a municipality's executive, legislative, and judicial branches, without *any federal basis*. The D.C. Circuit has also ruled that a federal court may engage in such "reform" without a definitive determination that there is *any legal basis* for federal-court administration of municipal affairs. These rulings are not faithful to the decisions of this Court, including *Arizonans for Official English v. Arizona*, 117 S. Ct. 1055 (1997), and conflict with the decisions of other Circuits.

Second, this is not a case that vindicates individual rights. Instead, it displaces the policy and legal judgments Congress has entrusted to the District's local institutions and to a federal agency. At trial, respondents merely established that its child-welfare system is flawed. They did not establish that these flaws violate rights guaranteed by the Constitution, federal child-welfare legislation, or local child-welfare law. Accordingly, the judgment in this case flatly contradicts *Blessing v. Freestone*, 65 U.S.L.W. 4265 (U.S. April 22, 1997). Respondents sought the assistance of the federal judi-

ciary to compel the District to hire more staff, improve its data processing systems, secure more federal monies, alter policy decisions governing children in the District's foster-care system, and the like. Their efforts should have been directed to the Council of the District of Columbia, its Mayor, and the Family Division of the Superior Court. The massive injunction they succeeded in securing is not legally supportable.

ARGUMENT

I. THE EXERCISE OF PENDENT JURISDICTION HERE CONFLICTS WITH THE DECISIONS OF THIS COURT AND OTHER CIRCUITS.

Respondents attempt to portray the D.C. Circuit's exercise of pendent jurisdiction here as a run-of-the-mill exercise of federal judicial power that is perfectly consistent with the decisions of this Court and the other Circuits. They do so even as they acknowledge three important principles that completely undercut their position: (1) the exercise of pendent jurisdiction is disfavored "when . . . state claims 'substantially predominate'" (Opp. 13); (2) "federalism concerns . . . lie at the heart of *Pennhurst II*,"[1/] (Opp. 16), not simply the language of the Eleventh Amendment; and (3) "The D.C. Court of Appeals, not the D.C. Circuit, is the final arbiter on matters of D.C. law." Opp. 21 n.14. These principles plainly cannot justify the D.C. Circuit's actions here -- to eschew federal law and base a sweeping injunction reforming local government solely on its understanding of local law; to invoke local law to displace, and otherwise interfere with, the policy and legal judgments Congress has assigned to the District's legislative, executive, and judicial branches; and to

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[1/] *Pennhurst State School & Hospital v. Halderman*, 465 U.S. 89 (1984).

embark on a foray into areas of local law that have not yet been charted by the District's highest court.

Furthermore, the D.C. Circuit, although citing *United Mine Workers of America v. Gibbs*, 383 U.S. 715 (1966), failed to follow it. First, the *LaShawn I* panel itself exercised pendent jurisdiction, without finding that the trial court's decision not to do so constituted legal error or an abuse of discretion. Second, contrary to respondents' suggestion that the panel considered the "myriad" factors set forth in *Gibbs* (Opp. 15), the panel ruled that it was free to exercise pendent jurisdiction simply in order to avoid what it stated were complex constitutional and federal statutory issues. Thus, the panel never considered that a federal court that seeks to reform local government institutions based on its interpretation of local law undermines important principles of democracy and federalism.[2/] In addition, fairness to the parties and judicial economy are not served by permitting respondents to litigate in two fora -- federal and local -- any local-law claims they may have. Concomitantly, the policy that disfavors requiring plaintiffs to split federal and local causes of action between federal and local courts does not support the D.C. Circuit's actions here because most respondents were parties to proceedings in the Family Division of the Superior Court when this federal action was brought. Respondents could and should have asserted their federal claims in that forum.

[2/]Insofar as the District is concerned, these principles are reflected in the District of Columbia Self-Government and Governmental Reorganization Act, Pub. L. 93-198, 87 Stat. 774 (1973), and the District of Columbia Court Reform and Criminal Procedure Act of 1970, Pub. L. 91-358, 84 Stat. 473 (1970). Given these measures, respondents' suggestion (Opp. 16) that federalism concerns are not present here because the District's judicial system has some federal aspects to it (*e.g.*, its judges are appointed by the President) is absurd. *See also District of Columbia Court of Appeals v. Feldman*, 460 U.S. 462 (1983).

II. THE DISTRICT OF COLUMBIA DID NOT WAIVE ITS OBJECTION TO THE EXERCISE OF PENDENT JURISDICTION.

Respondents argue, as they have in the past without success, that the District waived any right to object to the exercise of pendent jurisdiction. The District did not.

First, as respondents now concede, the trial court's liability decision in this case found only federal liability. In its first appeal, the District urged that all these federal liability rulings were wrong. Respondents countered that the *LaShawn I* panel should affirm because the trial court had exercised pendent jurisdiction and found local-law violations. They did not argue in the alternative that, if the trial court had declined to exercise pendent jurisdiction, that decision was erroneous under *Gibbs*. Indeed, their brief never cited *Gibbs*. In reply, the District urged that their argument was based on the false premise that the trial court had exercised pendent jurisdiction and it also urged that any local-law claims belonged in the courts of the District of Columbia.[3/] It urged, in short, that

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[3/]The District's Reply Brief 7-8 (Sept. 16, 1992) stated:

> *Judge Hogan did not decide any pendent District-law claims.* Instead, the only legal significance he attached to his discussion of District . . . law was that it creates liberty interests protected by the Due Process Clause of the Fifth Amendment. . . .
>
> *As a consequence, this Court should not decline to resolve the federal statutory claims on the grounds that it can affirm on pendent District-law claims.* . . . [W]hat appellees are seeking here is a judgment, not made below, that rests solely on District of Columbia law and DHS's internal operating manual, ***matters that plainly belong not in a federal court but in the courts of the District of Columbia.*** [Emphasis added.]

the *LaShawn I* panel should not overturn the trial court's judgment not to exercise pendent jurisdiction.

The debate over whether the trial court had exercised pendent jurisdiction continued at oral argument. Counsel for the District stated unequivocally that it had not done so and also urged that its refusal was correct because the highest court of the District of Columbia has never held that the District's child-welfare law is specifically enforceable. Transcript of Oral Argument 36 (Nov. 4, 1992) ("This is a local law issue. And it is a case of first impression and should be decided by the local Courts"); *see also id.* 4-10, 17-19, 34-36.

The *LaShawn I* panel rejected respondents' argument that the trial court had decided local-law claims in their favor. App. 84a-97a. Nevertheless, it excused their waiver of the argument that the trial court had erred in not exercising pendent jurisdiction; ruled that it appeared that local-law violations could sustain the remedial decree; and remanded for that purpose. App. 92a-97a. The fact that *LaShawn I* excused *respondents' waiver*, however, does not mean that the District was obligated to defend the trial court's decision not to exercise pendent jurisdiction or to repel an attack never made by respondents. In fact, of course, the District did so in its Reply Brief and at oral argument, and *LaShawn I* never suggested, and properly so, that the District had waived the argument that the trial court's decision not to exercise pendent jurisdiction was correct.

Second, because a federal court's power to reform local government institutions based on its interpretation of local law is limited, if it exists at all, and because the exercise of such power intrudes upon important democratic and federalism principles that override considerations of plaintiffs' convenience, a local government should not be deemed to have waived an objection to the exercise of such power unless such a waiver is absolutely clear. *Cf. Port Authority Trans-Hudson*

Corp. v. Feeney, 495 U.S. 299, 305-06 (1990) (in determining whether a state has waived its 11th Amendment immunity, a particularly strict standard applies: a waiver will be given effect only where it is stated by the most express language or by such overwhelming implication that there is no room for any other reasonable construction).

Third, a federal appellate court should not rule that a trial court has abused its discretion unless, in fact, it did so. Thus, even if respondents had urged that the trial court had abused its discretion in not exercising pendent jurisdiction and even if the District had agreed, the *LaShawn I* court nevertheless would have been obliged to determine for itself whether the trial court had erred. A federal appellate court certainly should not reverse a trial court's considered judgment on such an important matter based merely on the parties' say-so.

Finally, Congress has conferred exclusive subject matter jurisdiction of neglect and adoption proceedings on the Family Division of the Superior Court. D.C. Code § 11-1101(9) & (13) (1995 repl.). Congress has thus precluded a federal court from entertaining local-law neglect and adoption claims, a matter that requires judicial inquiry at all stages of the litigation. *See, e.g., Arizonans for Official English v. Arizona, supra*, 117 S. Ct. at 1071 (this Court is not "disarmed" by parties' acquiescence in "core matters of federal-court adjudicatory authority," and it has an obligation "to consider . . . the authority of the lower courts to proceed").

In short, the District is entitled to raise the argument that a federal court does not have the power to entertain local-law claims by children who are under the protective wing of the Family Division. When the Family Division, after considering the views of all interested persons, has concluded that a particular placement is in a child's best interest and has imposed on the District obligations to implement and effectuate that placement, a federal court does not have the power,

based on its understanding of local law, to entertain the same matters or to reform municipal institutions to advance them.[4/]

III. THE DISTRICT DID NOT CONSENT TO ANY REMEDIAL ORDER PURPORTEDLY BASED ON LOCAL LAW.

The District agreed to the remedial order in this case only after litigating liability and only after the trial court made sweeping findings of federal liability, findings which made it readily apparent that the trial court intended to order broad relief.[5/] And, the District reserved the right to appeal the trial court's liability decision. The District's agreement on remedy was, therefore, a "knuckling under to the inevitable," not a settlement of a case pursuant to a consent decree in which the parties resolve their disputes without burdensome litigation and determinations of fault. *People Who Care v. Rockford Board of Education*, 961 F.2d 1335, 1338 (7th Cir. 1992).

[4/]Here, for example, respondents, citing only the decision of the trial court, mistakenly claim that "[c]ontrary to the District's assertion, the consent [sic] decree is not based on the premise that an unpublished internal agency operating manual constitutes District law." Opp. 21. However, this is precisely the premise of the D.C. Circuit's *LaShawn I* decision. See App. 92a-93a, 95a-96a. And the court so ruled even though counsel for both sides advised that the unpublished manual has no legal effect. Thus, when asked by the court, "Do you agree [with the District that] the manual of operations is not law?", counsel for respondents, Ms. Lowry, answered: "I agree that it is not. It does not have the effect of law in the District of Columbia . . .." Transcript of Oral Argument 23 (Nov. 4, 1992).

[5/]For example, the decree reflected the trial court's ruling that the plan requirements of the federal Adoption Assistance Act, including its seemingly expansive "reasonable efforts" clause created rights, a ruling subsequently invalidated by this Court. *See supra* at 10.

Negotiated remedial agreements are construed according to principles of contract law in which the intent of the parties, as expressed in the agreement, governs enforceability. *See, e.g.*, *United States v. ITT Continental Baking Co.*, 420 U.S. 223, 236-38 (1975); *United States v. Armour & Co.*, 402 U.S. 673, 681-82 (1971). Here, the parties' intent in accepting the remedial order is clear. The bargain the parties struck, with the approval of the court, was that the District agreed to sweeping institutional reform based on the assumption -- to be challenged on appeal -- that the trial court's federal liability rulings were correct; in exchange, plaintiffs agreed that the remedial order would be null and void to the extent that those federal liability findings did not survive that appeal.

LaShawn I did not affirm *any* federal liability. Its decision to invoke pendent jurisdiction and to conditionally find liability based on local law does not alter this conclusion. The federal liability rulings plainly did not survive the appeal and thus the remedial decree based on those rulings was rendered null and void.[6/]

[6/]The distinction between federal and local liability is important. When local law and officials violate the Constitution and federal statutes, local law and officials must yield to that higher authority. Furthermore, federal courts have broad, but not unlimited, equitable power to remedy violations of federal rights, including the power to override local law and to direct the actions of local officials.

Here, for example, the District accepted, pending its appeal, the trial court's ruling that the internal operating manual of its child-welfare agency created liberty interests under the Due Process Clause of the Fifth Amendment. By contrast, this comprehensive and detailed manual, which sets forth how the agency should ideally operate, unquestionably has no legal effect under District law. *See supra* at 7 n.4.

IV. THE DISTRICT HAS NOT VIOLATED RIGHTS.

Respondents have elected to defend the merits of their case although the D.C. Circuit, at their urging, has refused to reach them. Their arguments, however, serve only to underscore why it is important for a federal court to (1) find a federal basis before reconstituting a local government and (2) limit itself to redressing violations of federal rights.

Thus, for example, respondents argue that "[n]one of the multiple federal adjudications *in this case* has been reversed to this day" and "the overwhelming majority of respondents' federal statutory claims remain viable." Opp. 14, 13-14 (emphasis added). The first point is literally correct, but only because the D.C. Circuit has never reviewed the merits of their federal claims. The second point is not true. Both federal statutes relied on by the trial court have been definitively found not to create rights under 42 U.S.C. § 1983. *See Suter v. Artist M.*, 503 U.S. 347 (1992) (federal Adoption Assistance Act); *Doe by Fein v. District of Columbia*, 93 F.3d 861 (D.C. Cir. 1996) (federal Child Abuse Prevention and Treatment Act). Nevertheless, respondents maintain here that the exact provision at issue in *Doe* is enforceable (see Opp. 3 & 5). In the case of respondents' constitutional claims, the D.C. Circuit has strongly suggested that they are insubstantial. In *LaShawn I*, the D.C. Circuit directed the trial court to reconsider only its federal statutory rulings should it conclude that the remedial order could not be upheld solely on local-law grounds and did not authorize the trial court to reconsider its constitutional rulings, even if necessary to support the decree.

Respondents make similar errors in analyzing District law. Thus, while ignoring Congress' grant of exclusive jurisdiction to the Family Division in neglect and adoption proceedings and disclaiming that this litigation has any impact on the Division, respondents, in support of their argument that the District violated local law, cite several local-law provi-

sions that are entrusted to Family Division oversight. See Opp. 3-4 (case plans, services to enable children to be returned home, adoption). Indeed, they even cite D.C. Code § 16-2323(b), which governs Family Division review of dispositional orders! Opp. 4. Respondents also cite (Opp. 4) a general provision authorizing the District's Department of Human Services ("DHS") which cannot possibly be construed to create rights.[7] *See, e.g., Blessing v. Freestone, supra.*

CONCLUSION

The D.C. Circuit has ruled that a federal court has no obligation to ensure that there is any legal basis for an injunction displacing, and interfering with, the functions of a municipality's legislative, executive, and judicial branches. This is a ruling that deserves review by this Court.

Respectfully submitted,

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[7] D.C. Code § 6-2122(c) (1995 repl.) states: DHS "shall have sufficient staff, supervisory personnel, and resources to accomplish the purposes of this act, including the capacity to provide emergency and continuing service resources to abused and neglected children and their families."